No. 17-1351

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, a project of the Urban Justice Center, Inc., on behalf of itself; HIAS, INC., on behalf of itself and its clients; MIDDLE EAST STUDIES ASSOCIATION OF NORTH AMERICA, INC., on behalf of itself and its members; MUHAMMED METEAB; PAUL HARRISON; IBRAHIM AHMED MOHOMED; JOHN DOES #1 & 3; JANE DOE #2,

Plaintiffs – Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF STATE; OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; REX W. TILLERSON, in his official capacity as Secretary of State; MICHAEL DEMPSEY, in his official capacity as Acting Director of National Intelligence,

Defendants – Appellants.

On Appeal from the United States District Court
for the District of Maryland (8:17-cv-00361-TDC)

REPLY OF DEFENDANTS-APPELLANTS IN SUPPORT OF MOTION FOR A STAY PENDING EXPEDITED APPEAL

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ARGUMENT

I. The Balance Of Harms Strongly Favors A Stay

A. The Injunction Imposes Serious, Irreparable Harm On The Government And The Public

1. Plaintiffs contend that overriding the President's national-security judgment does not "necessarily constitute[] irreparable injury." Opp. 7. In their view, the government must identify "concrete injury" through "evidence of any harm" to national security. Opp. 4-5 (emphases omitted). That is irreconcilable with *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers), which plaintiffs do not address. There, Chief Justice Roberts ruled that a State "suffers a form of irreparable injury" "[a]ny time [it] is enjoined by a court from effectuating statutes enacted by representatives of its people," and he stayed an order invalidating a State's DNA-collection law notwithstanding that the 10,000-plus samples collected the prior year resulted in only a handful of convictions. *Id.* at 1303.

The need for a stay here follows *a fortiori*. Compared to a single State's narrow law-enforcement tool, the President's Order is of "singular importance" to the Nation; reflects his "unique responsibility" over "foreign and military affairs"; and serves "an urgent objective of the highest order" "in combatting terrorism." Mot. 6-8 (quoting Supreme Court cases). Moreover, demanding specific evidence of injury is inconsistent with the Order's very nature as a "[p]redictive judgment[]" and "preventive measure" to improve current vetting procedures. Mot. 6.

2. Regardless, the Order itself contains a detailed recitation of the considerations underlying the President's national-security judgment. Mot. 3-5. Plaintiffs' three types of contrary "evidence" are nothing more than a policy disagreement with that judgment. *First*, plaintiffs object that the Order is too narrow to protect national security because of its exceptions and limitations. Opp. 5. But the President's accommodation of competing considerations—including due-process concerns raised by courts about the Revoked Order—hardly means the covered foreign nationals present no potential national-security risk. *Second*, plaintiffs claim that the Order is unnecessary based on an amicus brief of "former national security officials" and a draft "DHS report." *Id.* The President, however, is entitled to disagree with those sources and instead follow the recommendations of the current Attorney General and Secretary of Homeland Security. *Third*, plaintiffs observe that the injunction does not prevent the government from "taking other actions to address [the] security concerns," Opp. 6, but the President is entitled to take more than one preventive measure to defend the Nation.

3. Plaintiffs argue that the government has been dilatory and will not benefit from a stay. Opp. 3-4. That is incorrect.

First, plaintiffs criticize the government and the President for dismissing the appeal of the Revoked Order and deliberating for three weeks before issuing the new Order. Opp. 3. That is not a protracted period to consult with numerous agencies, compile additional factual support, and adopt several substantive changes that have materially affected courts' analysis of the Order. *E.g.*, *Sarsour v. Trump*, 2017 WL 1113305, at *11 (E.D. Va. Mar. 24, 2017) ("[The Order] is materially different in structure, text, and effect from [the Revoked Order] and has addressed * * * concerns raised" by courts); *Washington v. Trump*, 2017 WL 1045950, at *3-4 (W.D. Wash. Mar. 16, 2017) (noting "substantial distinctions" between the Orders).

Second, plaintiffs cannot persuasively assert that the government was dilatory here. The preliminary injunction was briefed and argued in six days. J.A.772. The government waited eight days to seek a stay only because it (i) proposed that the appeal be briefed on the same expedited schedule to facilitate this Court's consideration of the issues and (ii) filed its opening merits brief simultaneously. CA4 Doc. Nos. 14, 35-36.

Third, plaintiffs focus on a different suit, *Hawai'i v. Trump*, No. 17-50 (D. Haw.). Opp. 3-4. Although the district court there initially entered a temporary restraining order, it requested further briefing and argument regarding conversion to an appealable preliminary injunction. Opp. 4. Partly for that reason, the stay briefing schedule in the Ninth Circuit is a few weeks behind this case. But the stay briefing in both this Court and the Ninth Circuit will be done well before the merits appeals are decided, and thus the stays requested remain of paramount importance.

In sum, there has been no meaningful delay in this case or *Hawai'i*, and plaintiffs here cannot avoid the need for a stay simply because the *Hawai'i* district court separately entered a nationwide injunction that the government also has expeditiously challenged.

B. A Brief Stay Pending Appeal Would Not Impose Any Substantial Harm On Plaintiffs

1. The district court based the injunction on the putative injuries to certain individual plaintiffs (Does #1-3) whose relatives have applied for visas. Those asserted injuries are not even judicially cognizable, let alone substantial and irreparable harms.

First, plaintiffs have not shown that Section 2(c) will have any imminent impact on any visa applications by their relatives. Plaintiffs string-cite the relevant declarations, Opp. 19, but nothing there establishes that these particular applicants, if otherwise eligible, would have their visas delayed because they would be (i) received during Section 2(c)'s temporary, 90-day entry suspension, or (ii) slowed in processing because of Section 2(c).

Second, plaintiffs fail to show that the waiver determination—which will be integrated into the consular officer's review of the visa application—will delay that review. Opp. 20. Indeed, their single record citation confirms that they are speculating. J.A.269 (declarant concedes that she had "yet to receive any details about * * * how long waivers will take"). Plaintiffs alternatively argue that the waiver process forces their relatives "to submit to a process that imposes a discriminatory barrier." Opp. 20. But plaintiffs do not dispute that alien visa applicants have no constitutional rights against (allegedly) discriminatory barriers to entry; nor do they dispute that U.S.-based relatives of alien applicants have no right to challenge (allegedly) discriminatory barriers that are applied to the applicants abroad, rather than the relatives themselves. *Id.*; Mot. 13-14.

Third, plaintiffs argue that because they exercised "their statutory rights" to file "family reunification petitions," Section 2(c) discriminates *directly against them*. Opp. 19-20 (emphasis omitted). But although plaintiffs claim that Section 2(c) is based on or motivated by the religion of the visa *applicants* whose entry is suspended, they do not allege that it discriminates in any way based on the religion of the visa *petitioners*. Plaintiffs thus cannot assert claims in their own right as visa petitioners because they "do not allege any infringement of their own religious freedoms." *Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 641 F.3d 197, 207 (6th Cir. 2011) (en banc).

Fourth, plaintiffs assert that they have suffered more than "abstract stigmatic injur[ies]" because Section 2(c) "condemns" plaintiffs' "own religion and their own community." Opp. 16-17. But unlike in plaintiffs' cited cases, Section 2(c) does not expressly convey any "governmental *message* [concerning] religion," and a facially neutral "government *action*" cannot be "re-characterized" as a religious message that may be challenged by "anyone who becomes aware of [it]." *In re Navy Chaplaincy*, 534 F.3d 756, 764 (D.C. Cir. 2008).

2. Plaintiffs try to justify the injunction based on the organizational plaintiffs' alleged injuries. Opp. 17-19. The district court did not find that those organizations had standing to obtain injunctive relief, and they plainly lack any cognizable injury.

First, the organizations' alleged refugee-related injuries from the Order are irrelevant. Those injuries cannot support the injunction, which covers Section 2(c)'s entry suspension but not Section 6's refugee provisions. Mot. 10-11; Opp. 18.

Second, plaintiffs have not shown that the organizations have any non-refugee-related injuries from the Order. Although they again string-cite their declarations without elaboration, none of the cited pages identifies any organizational client or member who has concrete and imminent plans to seek non-refugee admission, let alone one whose visa application is likely to be delayed or denied because of Section 2(c). Opp. 17-18. Nor do the cited pages identify any organizational resource that was diverted, wasted, or lost because of Section 2(c)'s entry suspension, wholly apart from Section 6's refugee provisions, even assuming such a showing would establish standing. Contrary to Plaintiffs' suggestion (Opp. 19 n.10), their lack of such evidence means that they have not carried their "burden of proof" for standing at the preliminary-injunction "stage[] of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

Third, the fundamental flaw that plaintiffs "do not allege any infringement of their own religious freedoms," *Smith*, 641 F.3d at 207, is particularly glaring for the organizations. Compared to the individual plaintiffs, the organizational plaintiffs are even further removed from the non-party visa applicants who are allegedly being discriminated against under Section 2(c). The organizations have not even alleged that they themselves are petitioners for visa applicants or affiliated with Islam.

3. Even if plaintiffs were to have some cognizable injury from Section 2(c)'s 90-day entry suspension, it would not be substantial enough to overcome the national-security interests of the government and the public. That is especially true because, as plaintiffs themselves emphasize, the stay would be in effect for a relatively short period during the expedited appeal: any temporary delay in any visas for the relatives of Does #1-3 is not irreparable harm and is far outweighed by the terrorism-related concerns considered by the President, Secretary of Homeland Security, and Attorney General.

II. The Government Is Likely To Prevail On The Merits

A. The district court erred in concluding that Section 2(c) likely exceeds the President's statutory authority. As the court recognized, and plaintiffs do not dispute, 8 U.S.C. § 1182(f) authorizes the President to suspend entry of the aliens covered by Section 2(c). Op. 20-21. Plaintiffs argue that Section 2(c) "does not regulate 'entry' at all," Opp. 15, but it expressly requires "that the *entry* into the United States of nationals of [the listed] countries be suspended for 90 days," subject to certain exceptions and case-by-case waivers, § 2(c) (emphasis added). Plaintiffs do not explain why 8 U.S.C. § 1152(a)(1)(A) requires granting a visa to an alien who is validly barred from entering—or why Congress would have desired that such aliens receive visas to travel to the United States, only to be denied admission upon physical arrival. Plaintiffs likewise fail to explain why Section 1152(a)(1)(A), which applies only to immigrant visas, has any bearing on the far larger number of applicants seeking nonimmigrant visas.

B. The district court also erred in concluding that Section 2(c) likely violates the Establishment Clause. Like the district court, plaintiffs disagree that *Kleindienst v. Mandel*, 408 U.S. 753 (1972), governs their claims challenging denial of entry of aliens. Opp. 11-12. But they correctly do not defend the court's reasoning that *Mandel* applies only to alien-specific decisions by executive officers, not policy determinations by the President. Plaintiffs instead assert that *Mandel* has not yet been applied to Establishment Clause claims. Opp. 12. The Supreme Court, however, has applied *Mandel*'s rule to reject First Amendment claims of viewpoint discrimination, 408 U.S. at 767-70, and other allegations of unconstitutional discrimination, *Fiallo v. Bell*, 430 U.S. 787, 792-96 (1977). Plaintiffs offer no justification for arbitrarily excluding religious-discrimination claims. And under *Mandel*'s test, the Order is expressly based on a facially legitimate, bona fide reason: protecting national security. Moreover, although the President's motives are irrelevant, any argument of bad faith is undercut by his revisions of the Order to accommodate courts' concerns.

Not only do plaintiffs fail to justify exporting domestic Establishment Clause precedent to this foreign-relations and national-security context, but their claims fail even under that precedent. They note that "[f]acial neutrality is not determinative," but they disregard the limited universe of additional evidence the Supreme Court has considered. Opp. 11 (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993)). *Lukumi* concluded that local ordinances worked a "religious gerrymander" based on their "text" and "operation." 508 U.S. at 532-40, 542. And *McCreary County v. ACLU*, 545 U.S. 844 (2005), which addressed an overtly religious display, considered the display, local resolutions, and the official record of their adoption. *Id.* at 868-74. None of the Court's cases supports overturning the President's facially neutral national-security risk assessment based on statements made outside the policymaking process, least of all campaign-trail comments. And relying on those statements to infer an intent to ban Muslims from the country would be particularly unwarranted here, because Section 2(c)'s limited, temporary pause on entry demonstrates that its purpose instead is to address a previously recognized national-security concern posed by six particular nations.

III. The Nationwide Injunction Is Improper

Plaintiffs also fail to justify the injunction's demonstrable overbreadth. They do not defend its improper attempt to enjoin the President. Nor do they demonstrate that barring enforcement of the Order against all persons is necessary to redress the individual plaintiffs' own alleged injuries concerning their relatives abroad. Plaintiffs conclusorily assert that a narrowed injunction "would not address the organizational plaintiffs' injuries." Opp. 21. But the organizations have shown no cognizable injury from Section 2(c). *Supra* pp. 6-7; *see U.S. Dep't of Defense v. Meinhold*, 510 U.S. 939 (1993) (staying injunction insofar as it "grant[ed] relief to persons other than" plaintiff).

Plaintiffs assert that "Article III is no barrier" to enjoining the Order wholesale. Opp. 22. They do not address *Lewis v. Casey*, 518 U.S. 343, 357 (1996), which held that "[t]he remedy" sought must "be limited to the inadequacy that produced the injury in fact that the plaintiff has established." Nor do they address *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001), where this Court narrowed an injunction that was broader "than necessary to provide complete relief to the plaintiffs." Although the FEC regulation there violated the First Amendment, this Court held that the district court abused its discretion by enjoining it nationwide. *Id.* at 392-94. Nationwide relief was unnecessary to redress the plaintiff's injury, and it improperly interfered with the agency's ability to defend—and other courts' ability to consider—the regulation's validity in litigation elsewhere. *Id.* at 393-94. That is equally true here.

Plaintiffs argue that "the ordinary result" when "agency regulations are [held] unlawful" is to vacate the regulation altogether. Opp. 22 (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989)). But *Harmon*'s characterization rested on the APA, 5 U.S.C. § 706(2), which does not apply to the President's Order, *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992). And as this Court has held, even where the APA applies, "[n]othing in [its] language" requires granting overbroad injunctive relief. *Va. Soc'y*, 263 F.3d at 393-94; *see* 5 U.S.C. § 702(1). Although Plaintiffs rely on *Harmon*, the D.C. Circuit there declined to narrow an injunction because doing so required "drawing a line which the agency itself has never drawn." 878 F.2d at 494-95. Here, the Order's severability clause (§ 15(a)) forecloses that rationale and makes limiting the injunction to plaintiffs' own injuries even more appropriate.

Finally, plaintiffs assert that the overlapping, nationwide injunctions imposed here and in *Hawaii* counsel against a stay. Plaintiffs have it precisely backwards. As this Court explained in *Virginia Society*, the risk that either nationwide injunction will affect other pending litigation is further reason that both are improper. 263 F.3d at 393-94; *Ga.-Pac. Consumer Prods. LP v. von Drehle Corp.*, 781 F.3d 710, 715-17 (4th Cir. 2015). Plaintiffs cannot leverage unjustified relief in another court to defend equally unwarranted relief in this Court.

CONCLUSION

The stay pending appeal should be granted, in whole or at least insofar as the injunction extends beyond any plaintiffs whom this Court deems to have shown sufficient cognizable, irreparable injury.

Respectfully submitted,

/s/ Jeffrey B. Wall

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APRIL 2017

CERTIFICATE OF COMPLIANCE

I hereby certify that this reply complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-volume limitations of Fed. R. App. P. 27(d)(2)(C). This reply contains 2,584 words, excluding the parts of the motion excluded by Fed. R. App. P. 27(d)(2) and 32(f).

/s/ Sharon Swingle
Sharon Swingle

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2017, I electronically filed the foregoing reply with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Sharon Swingle
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